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IN THE
Supreme Court of the United States

OCTOBER TERM—1943

No. **173**

FREDDIE RICH,

Petitioner,

—against—

EULA MARLENE RICH,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT AND BRIEF IN
SUPPORT THEREOF.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Freddie Rich petitions for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, which affirmed an order of the District Court of the United States for the Southern District of New York (R. 28-29) that set aside the discharge in bankruptcy granted by the Referee to the petitioner (R. 23-24).

Summary Statement of Matter Involved.

Petitioner filed a voluntary petition in bankruptcy on March 29, 1940 (R. 18).

Petitioner and respondent are husband and wife, judicially separated. Respondent's bankruptcy claim against petitioner is not for alimony, for that is being paid. Respondent's claim is based on loans (R. 3). Respondent is the only one of petitioner's creditors to oppose the discharge.

The respondent filed six specifications of objections to petitioner's discharge (R. 5-17). The Referee found that none had been sustained (R. 20-22). Without finding that the Referee's conclusion was clearly erroneous, the Courts below reversed the Referee and sustained the first and fourth specifications.

The Referee conducted thorough and exhaustive hearings on four separate days. After mature consideration of the evidence, seeing and hearing the petitioner and the witnesses who testified, the Referee rendered his opinion in writing and findings (R. 18-22). He said *inter alia*:

"However, with regard to the First Specification, it does appear that the bankrupt did keep certain records and papers which were delivered by him to the Trustee in Bankruptcy or to his former attorneys, Messrs. Gluskin and Richardson, the latter of whom claimed a lien on the books, papers and records for the value of his legal services, although he testified in the proceedings and had with him some of said records.

It is a fact that the bankrupt did not keep a complete set of books but it appears that he is a musician, known for his conducting certain radio programs, and that for the greater portion of the time, concerning which he was examined, he was represented by various representatives who attended to the business details and who kept records showing the various payments made and amounts that were delivered to the bankrupt.

* * * * *

The testimony is such that it does not lend itself easily to summary but a careful examination of the same has led the undersigned Referee to the conclusion that the character of the occupation of the bankrupt was such that his failure to keep a complete set of books was justified under all the circumstances of the case,

especially in view of the fact that details were available in the books of his representatives. The undersigned is therefore of the opinion that the First Specification has not been sustained.

* * * * *

With reference to the Fourth Specification, that the bankrupt testified falsely under oath, it does appear that the bankrupt, apparently laboring under emotion, failed to remember certain matters concerning which he was questioned, but an examination of all of the testimony in the proceeding will disclose that subsequently particulars were given, and it can not be said that the bankrupt testified wilfully falsely in the proceedings.

On the whole case, the undersigned Referee is of the opinion that the Fourth Specification has not been sustained.

* * * * *

In view of the above, the undersigned Referee is of the opinion that the discharge of the bankrupt should be granted."

The Facts.

The petitioner is a musician. He conducted an orchestra which performed over the radio for a single sponsor for a stated period of time under a written employment contract (R. 20). Pursuant to its terms all compensation covering the radio broadcasts were made to the petitioner's representative, sometimes called agent or business manager (R. 108-140). From the employment compensation thus received petitioner's representative paid all expenses of the broadcast, such as the musicians comprising the orchestra, overtime, special orchestration arrangements and regular orchestration arrangements, musician's union fees, unemployment, social security and other taxes, and commissions to booking agents and other personal representatives (R. 91-99). The

net remaining after these deductions was paid over to the petitioner as his personal compensation (R. 93-99). These receipts and disbursements are recorded in petitioner's books and records (R. 69-70; 91-99). Petitioner surrendered to the Trustee in Bankruptcy all the records in his possession including his employment contracts with his radio sponsor and with his agent and business manager (R. 69-70; 91-99). The petitioner's agent testified before the Referee, and at said hearings produced the books and records which he maintained (R. 91-99).

The Referee found that the petitioner's books and records satisfied the statutory requirement (R. 20-21).

The Circuit Court and the District Judge resolved against petitioner a factual controversy in which the Referee's inferences of the evidence were rejected by these Courts, because they would have drawn a different conclusion, were the matter before them as an original proposition instead of as a reviewing Court. Neither of these Courts found or stated that the Referee's conclusion is "clearly erroneous" or that it is without support in the evidence; for such is not the fact. The Referee's conclusion is supported by substantial evidence.

Question Presented.

The question presented is whether Section 38 of the Bankruptcy Act, as amended by Act of Congress June 22nd, 1938, by the addition of Clause 4 (11 U. S. C. A. 66), permits either the District Judge or the Circuit Court to set aside a discharge in bankruptcy granted by a Referee, in the absence of a finding that the Referee's conclusion was "clearly erroneous"?

The Jurisdiction of this Court.

The order to be reviewed was entered in the Circuit Court of Appeals on May 5, 1943.

The jurisdiction of this Court to review the order of the Circuit Court of Appeals, for the Second Circuit, is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress February 13th, 1925 (28 U. S. C. A. 347(a)).

Reasons for Allowance of the Writ.

The cause presents a question of prime importance in the administration of justice in all the Courts of the United States in that it involves construction of Section 38 of the Bankruptcy Act, as amended, with Clause 4 added (11 U. S. C. A. 66), which has not been heretofore interpreted by this Honorable Court (*Wragg v. Federal Land Bank of New Orleans*, 317 U. S. 325; 63 S. Ct. 40; *Leishman v. Associated Wholesale Electric Co.*, 318 U. S. 203).

Prayer.

WHEREFORE, petitioner respectfully prays that this Honorable Court issue under the seal of this Court a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and the proceedings of said Court had in this case, to the end that this cause may be reviewed and determined by this Court; that the order herein of said United States Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

FREDDIE RICH

By JOSEPH NEMEROV

His Counsel

Dated, New York, N. Y., July 8, 1943.